780

SUPREME COURT OF THE UNITED STATES.

No. 81.

CHARLOTTE A. PARISH, APPELLANT.

vs.

HARVEY W. ELLIS AND WIFE.

AN APPEAL FROM THE COURT OF APPEAL OF FLORIDA.

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S. D. Langtree, Print.

TERRITORY OF FLORIDA.

Pleas at the court-house in the city of Tallahassee, before the court of appeals for said territory, on Monday the tenth day of February, in the year one thousand eight hundred and forty.

Present: the honorable Thomas Randall, Presiding Judge; Richard C. Allen and Dillon Jourden, Associate Judges.

Be it remembered, that heretofore, to wit, on the 1st day of January in the year one thousand eight hundred and forty, came Harvey Ellis and wife, by their attorney, and filed the following record with the clerk of said court of appeals, to wit:

"Pleas at the court-house in the town of Monticello before the superior court of the middle district, in and for the county of Jefferson, on Thursday the seventh day of November, in the year one thousand eight hundred and thirty-nine.

"Be it remembered, that heretofore, to wit, on the 29th day of November, in the year one thousand eight hundred and thirty-eight, came Charlotte A. Parish, by her attorney, and filed with the clerk of said court, her petition for dower in the estate of James L. Parish deceased, which petition, with the endorsements thereon made, is in the words and figures following:

To the honorable Thomas Randall, Judge of the Superior Court of the middle district of Florida, at Monticello in the county of Jefferson.

The petition of Charlotte A. Parish, humbly complaining, sheweth unto your honor, that James L. Parish, late of said county, deceased, died, leaving in said county an estate consisting of realty and personalty as follows, to wit: eighty acres known as east half of the south-west quarter of section two, township one, north of range five east; and eighty acres known as the east half of the south-west quarter of section twenty-eight, township two, range five, north and east; also the following town lots in the town of Monticello, known in the plan of said town as lots 61, 62, 67, 68, 83, 84, 93, 94, 103, 104, 113, 114, 119, 120, 129, 130; also the following slaves: Wann, Amy, Sandy, Charles, John, Joel, Nelly, Mina, Sena, Solomon, Betsy, Gilbert, Wann, jr., Mary Ann, Louisa, Charles, jr., Cornelius, Milly, Amy, jr., Celia, Ryal, Addison, William, Hannah, Jack, Mina's child; also household and kitchen furniture, choses in action and other personalty; that the said James L. Parish died without issue; that Catharine Ellis, wife of Harvey Ellis, and sister of the said James L. Parish, is his sole heir; that your petitioner is the widow of the said James L. Parish, and makes her election to have an heir's part of said estate in pursuance of the statute of 1838, entitled "an act to amend an

act concerning dower," being one-half of said estate, real and personal: and your petitioner further states that the said estate is now in the hands of Martin Palmer as administrator, and your petitioner being desirous of having her share in said estate allotted to her, prays that the same may be done in pursuance of the statute in such case made and proved, and as &c.

"McCANTS,
"*Solicitor for Petitioner.*

"I acknowledge service and notice of the within, November 29th, 1838.

MARTIN PALMER,
Administrator.

"And on the same day and year last aforesaid, to wit, at a superior court for the middle district of Florida in and for the county of Jefferson at the court-house in the town of Monticello aforesaid, on the 29th day of November, A. D. 1838; upon hearing the prayer of the said petitioner, it was ordered that the writ do issue for the allotment of her dower as prayed for in pursuance to the act of 1838, and that the sheriff be directed to deliver over to the petitioner her portion of the estate herein set forth, according to her election in pursuance of and under the act of the legislative council of Florida passed in 1838, and entitled "an act to amend an act concerning dower."

"And at another day, to wit, on the eighth day of December, in the year 1838, a writ for the allotment of dower, was sued out of the clerk's office of said superior court, which writ with the endorsement and return thereon made, is in the words and figures following:

SUPERIOR COURT OF THE MIDDLE DISTRICT OF FLORIDA,
Jefferson County, at November Term, 1838.

"Exparte: Charlotte A. Parish.

By the honorable Thomas Randall, Judge of the Superior Court of the middle district of Florida for the county of Jefferson—to the sheriff of said county, greeting:

"We command you, that without delay, you summon five discreet freeholders as commissioners, connected with the parties neither by consanguinity nor affinity, and entirely disinterested, who shall upon oath (which oath you are authorized to administer) allot and set off by metes and bounds to Charlotte A. Parish, widow of James L. Parish deceased, one half part according to quantity and value, of the estate of the said deceased, in said county, consisting of realty and personalty as follows, to wit: eighty acres of land known as the east half of the south-west quarter of section two, township one, north of range four east; also eighty acres of land known as the east half of the south-west quarter of section twenty-eight, township two, range five north and east; also the following town lots in the town of Monticello, known in the plan of said town as lots Nos. 61, 62, 67, 68, 83, 84, 93, 94,

103, 104, 113, 114, 119, 120, 129, and 130; also the following slaves, to wit: Wann, Amy, Sandy, Charles, John, Joel, Nelly, Mina, Sena, Solomon, Betsy, Gilbert, Wann, jr. Mary Ann, Louisa, Charles, jr. Cornelius, Milly, Amy, jr. Cilla, Ryal, Addison, William, Hannah, Jack, Mina's child: also household and kitchen furniture, choses in action and other personalty; and that you make return thereof and the proceedings had thereon at our April term next, according to law.

"Witness William Budd, clerk of our said court, at Monticello aforesaid, this eighth day of December, A. D. 1838, and of the Independence of the United States the sixty-third year.

"WM. BUDD, *Clerk.*

"Endorsement—Came to hand 8th December, 1838,

W. R. TAYLOR, *Shff.*

"Return—Pursuant to the within writ, I have summoned William Livingston, David Wolf, James Scott, Paul Ulmer and Moses Ellis commissioners, freeholders, entirely disinterested, and connected to the parties neither by affinity or consanguinity, who being duly sworn, under my direction sett off and allotted the dower of said widow according to law, as by their report hereto annexed, and filed 18th December, 1838.

"W. R. TAYLOR, *Shff.*

("Commissioners' Report.)

"The commissioners, summoned to appraise the property of the late James L. Parish, and to sett off by metes and bounds to Charlotte A. Parish, widow of said deceased, have allotted to said widow as her dower, the following named negroes, lots of land and articles of household furniture, viz:

Wan and Amy,	150 00	
Charles,	940 00	
Nelly,	650 00	
John,	600 00	
Wann, jr.	600 00	
Mary Ann,	300 00	
Charles, jr.	200 00	
Mina and child, Nelly Jane,	850 00	
Louisa,	275 00	
Betsy,	575 00	
		5,140 00
"Lots, numbers 119, 120, 129, 130, in the town of Monticello, being the late residence of the deceased,		2,520 00
One high post beadstead and bedding,	50 00	
One bureau and fixtures,	30 00	
One leather trunk,	15 00	
One book-case and books,	60 00	

Seven cane bottom chairs (e a rocker), -	12 00	
One small mahogany dining table, -	15 00	
Half doz. table spoons, one doz. tea spoons, sugar tongs, and a glass pitcher, - -	34 00	
One carpet $15, andirons, shovel and tongs $15, one washstand bowl and pitcher, $4, -	34 00	
		250 00
		$7,910 00

"Total amount allotted to Charlotte A. Parish, widow of James L. Parish deceased, $7,910 00.

Witness:

WM. BUDD, *Clk. Sup. Court, Jefferson County.*

WM. LIVINGSTON, [L. S.]
DAVID WOLF, [L. S.]
JAMES SCOTT, [L. S.]
PAUL ULMER, [L. S.]
MOSES ELLIS, [L. S.]
Commissioners.

December 18th, 1838.

("Further Report of Commissioners.)

"To the honorable Thomas Randall, Judge of the middle district of Florida at Jefferson Superior Court, April term, 1839.

"The commissioners, summoned by the sheriff of Jefferson county to allott the dower of Mrs. Charlotte A. Parish, widow of James L. Parish deceased, respectfully submit—that after dividing off to the widow one moiety of all the estate, excepting that part which consists of choses in action, find it impracticable to allot to the said widow her moiety of this portion of the estate, many of the notes are barred by the statute of limitations, and some are by insolvent persons; whereupon (*wherefore*) the commissioners recommend to the court that the administrator be permitted, under the sanction of the decree of the court, to pay to the said Charlotte A. Parish a moiety of the money realized from this portion of the estate which consists of choses in action.

WM. LIVINGSTON,
DAVID WOLF,
PAUL ULMER,
MOSES ELLIS.

April 5th, 1839.

"And at another day, to wit, on the fifteenth day of April came Harvey W. Ellis for himself and wife Catherine, by their attorney, and filed in the clerk's office of said superior court their caveat or exceptions to the report of the commissioners aforesaid, which caveat or exceptions are in the following words and figures:

IN THE SUPERIOR COURT, MIDDLE DISTRICT OF FLORIDA,
Jefferson County.

"In the matter of the application of Charlotte A. Parish, wi-

dow of James L. Parish, late of Jefferson county deceased, for dower in said estate.

"And now on this day of April, 1839, comes Harvey W. Ellis for himself and his wife Catherine, formerly Catherine Parish, sister and heir at law of the said James L. Parish deceased, and excepts and objects to the proceedings in relation to, and to the assignment of dower by the commissioners appointed under order of the court at the last term.

First. Because the said application was premature, and before the estate was settled up, so that "an heir's part of said estate" claimed by the said widow under the act of 1838 could be correctly ascertained, set off, and allotted to her.

Second. Because of evident collusion between the widow and her father, the administrator, in obtaining said order for the writ of dower.

Third. Because the amount of real and personal estate set off and allotted to said widow is much larger and greater in value than she is entitled to by law.

Fourthly. Because the said allottment or assignment to the said widow of said real and personal estate is not made in pursuance of law or the directions of the writ.

Fifthly. Because the said proceedings and writ and report of the commissioners aforesaid is in other respects informal, illegal, and in violation of the rights of the heir at law.

And the said Harvey W. Ellis, for himself and Catharine, his wife, prays that the proceedings on said application of Charlotte A. Parish may be set aside and quashed, &c.

L. A. THOMPSON,
Proctor for Caveators.

And at another day, to wit, on the 7th day of November 1839, came the caveators, by their attorney, and filed in the said court an agreement between the said in the following words and figures:

JEFFERSON SUPERIOR COURT, *Fall Term*, 1839.

Exparte: Charlotte A. Parish, on petition for allottment of dower, &c.

In this cause it is admitted as if fully proved in the cause. That in the allotment of the petitioner's dower by the commissioners under the writ issued in this case, the said commissioners alloted and assigned to the said petitioner as and for her dower in the estate of her deceasad husband, James L. Parish, one-half part of the gross amount of said estate in quantity and value.

2dly. It is further admitted, as if fully proved, that the estate of the said James L. Parish is indebted to sundry persons about twelve thousand dollars, and which amount is to be paid out of the said estate.

Copy of Inventory filed.

Inventory of the Slaves and Personal Property of James. L. Parish, deceased, late of said county of Jefferson, in the Territory of Florida.

Twenty-five slaves, to wit: Old Wann, Old Amey, Nelly, Charles, Mina, Louisa, Joel, Gilbert, Milly, Celia, Addison, Hannah, Jack, Betsy, John, Wann, jr., Mary Ann, Charles, jr., Sina, Cornelius, Amy, jr., Ryall, William, Solomon, Sandy.

Personal Property, to wit:

1 wagon and gear for 6 mules,
6 mules and 3 horses,
7 ploughs and 6 plough gear,
1 buggy,
60 Hoes,
3 pair old stleeyards,
2 bear and 2 sheep skins,
1 whip saw,
1 pair waffle irons,
1 pair pistols and case,
1 pistol,
4 pair horse fleams,
4 pair boots and 2 pair shoes,
1 work and 2 dining tables,
1 bureau and 1 book case,
3 axes and 3 hatchets,
2 Allen ploughs,
2 shovels and 2 grubbing hoes,
2 foot adzes and 1 fore plane,
1 pair fire dogs,
2 horse dresses,
3 men's saddles,
3 side saddles,
1 dog chain,
3 shuck collars,
7 trace chains,
1 writing desk table,
6 baskets,
1 cannister oil,
3 demijohns,
1 keg mackarel,
1½ bbls pork,
1 lot bacon, about 500 lbs,
2 gallons whiskey,
4 jars,
1 grindstone,
6 silver table spoons,
12 silver tea do
1 silver butter knife,
1 sofa and 1 carpet,
2 rocking chairs,
16 setting chairs,
1 set drawers and glass,
2 bedsteads,
2 large mirrors,
1 Map United States,
140 volumes books,
1 cot and mattress,
3 feather beds,
1 hair mattress,
Wearing apparel,
3 Marseilles quilts,
12 sheets and 2 sets bed curtains,
12 spreads and quilts,
1 violin,
1 sword cane,
2 cut pieces bear duck,
1 liquor case,
1 dozen dinner and half dozen desert knives and forks,
1 wash basin,
1 pitcher,
3 common trunks,
2 travelling trunks,
1 Cochrane patent rifle,
1 double barrel gun and rifle,
1 tin cannister,
18 pillow cases,
6 towels,
3 table cloths,
1 table cover,
2 bolsters and 4 pillows,

14 plates and 3 dishes,	1 broken candle shade
1 pair mill stones,	1 tureen
3 clevers,	2 castors and bottles,
3 iron pots,	1 lamp,
2 tea kettles and 1 Dutch oven,	1 glass pitcher,
1 sett of white and gold china,	5 glass dishes and 2 jars,
1 sett chrystal,	2 sugar boxes,
1 candle shade,	1 pair salt cellars,

Cattle and hogs, number unknown.

Money, notes, and other evidences of debt, viz:

In current bank notes,	$105 00
Account against Jeremiah Drew,	23 13
Jeremiah Drew's note,	22 00
Jacob Pattison's note,	12 00
Henry B. Edwards's note,	20 00
Samuel Stokes's note,	12 00
James Entickin's note,	35 00
Joel Conyeir's note,	3 37½
Account against L. M. Goldsborough,	152 00
Account against John D. Parish,	2,481 39
Order on Colonel R. Parish,	38 96
Isaac Townsend's due bill,	10 00
J. B. Scott's note,	108 00
Order on J. Entickin,	5 00
Levi Hain's note,	21 00
Solomon E. Mather's note,	25 00
William Lard's note,	40 00
David Y. Farmer's note,	435 00
William T. Clark & Co.'s note,	30 00
John Brook's note,	10 00
James Stewart's note,	13 00
K. M. Moore's note,	36 80
James S. Gill's note,	20 60
Charles T. Ulmer's note,	49 00
John Brook's note,	5 00
Farquhar Macrae's note,	800 00
Minor Walker's note,	360 73
Do do	130 00
Martin Palmer, do	1,300 00
Adam Wirick balance note,	864 33
Benjamin Byd & Co.	51 40
Benjamin Mellechamp's note,	97 64
Samuel H. Duval's receipt for note of Judge Randall's,	185 00
Sol. Smith's and William Bellamy's note,	25 00
J. M. Scott's note,	50 00
Cullen E. Arledge's note,	20 00

William H. Vincent's note,	4 50
Charles T. Ulmer's note,	300 00
Cullen E. Arledge's note,	8 87
John M. Leak's note,	5 00
Jas. B. Watt's note,	6 00
Thos. J. Linton's note,	15 00
Willis Cason's note,	10 00
A. Bellamy's note,	132 00
J. E. Swilley's note,	50 00
John Hardison's note,	23 75
James Branch's note,	19 00
Do do	10 00
John W. Newman's note,	9 38
Thomas S. Gill's note,	10 00
James R. Tucker's note,	50 00
John Bellamy's note,	50 00
W. H. Mathew's note,	30 00
Bazil Pickston's note,	20 00
A. G. Rogers' note,	17 50
	$8,359 35½

MARTIN PALMER,
Administrator of J. L. Parish, deceased.

Monticello, 20th October, 1838.

A true copy of the original on file in my office.
S. R. SESSIONS,
Clerk Jefferson County Court,
By deputy, WM. BUDD.

May 28th, 1839.

And now, at this day, to wit, at the superior court *at the superior court* of the middle district of Florida in and for the county of Jefferson, held at the court house Monticello aforesaid on the same day and year first herein mentioned, to wit, on Thursday, 7th day of November, 1839. The exceptions to the commissioner's report being argued by counsel, it was ordered that the same be overruled *pro forma*, and by consent of parties it was ordered that the said commissioner's report be confirmed *pro forma*, and that an appeal be entered to the court of appeals without bond or security.

MIDDLE DISTRICT OF FLORIDA,
Jefferson County, to wit.

I, William Budd, clerk of the superior court of the middle district of Florida in and for the county of Jefferson, do hereby certify that the foregoing (pages marked 1 and 10 inclusive,) is a true

transcript of the record and proceeding in a certain application of Charlotte A. Parish, widow of James L. Parish, deceased, late of Jefferson county, for dower in said estate, with all things touching the same, as fully and wholly as they now exist among the records of my office.

In testimony whereof, I hereto set my hand, and annex the seal of said *of said* court, this 4th day of December, [L. S.] in the year of our Lord one thousand eight hundred and thirty-nine.

WM. BUDD, *Clerk.*

And at another day, to wit, on Thursday, January 23d, in the year 1840, came the parties, by their attorneys, and this cause being partly heard upon the transcript of the record aforesaid, and arguments of counsel, and is continued till to-morrow for a further hearing thereof.

And at another day, to wit, on Monday, January 27th, A. D. 1840, this cause was further heard upon the transcript of the record aforesaid, and arguments of counsel, and is continued till to-morrow for a further hearing thereof.

And at another day, to wit, on Saturday, February 1, A. D. 1840, this cause was fully heard upon the transcript of the record aforesaid, and arguments of counsel. But because the court is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

Final Decree.

And at another day, to wit: at a session of the court of appeals for the territory of Florida, to wit, on the day and year first herein mentioned, viz, on Monday, the 10th day of February, in the year one thousand eight hundred and forty, came the parties, by their attorneys, whereupon the transcript of the record of the judgment aforeasaid being seen and inspected, it seems to the court here that there is manifest error in said judgment. It is therefore considered and ordered by the court that the said judgment and decree be reversed and annulled, and the report of the commissioners whereon the same is founded be vacated and set aside; and that the cause be remanded to said superior court for Jefferson county, with direction to proceed further therein according to law.

Opinion of the Court by Judge Allen.

All the members of the court concur in the opinion that the widow's share taken under the act of 1838, as a "child's part," is liable with the other shares to the debts of the estate. A question however has arisen as to the construction to be given to the acts of '28

and '38, in which all the judges do not concur. The question is as to the true import and effect to be given to the words "child's part," in the first section of the act of 1838. In the case under consideration there is no child, and the question is, can such a construction be given to the act and those words in it, as to make it applicable to a case like the one before us.

The following is a part of the second section of the act of 1828: "If there be no child, or but one child, in that case she shall be entitled to one half, but if there be more than one child, in that case she shall be entitled to one third part in fee simple, except slaves, in which she shall have a life estate, and such claims shall have preference over all others."

Under the foregoing provisions the widow could, in no case, take more than one half of the personal estate in absolute property, and a life estate in one half the slaves. In cases where there is no child and no debts, the widow would take one half of the personalty absolutely, and a life estate in one half the slaves, while the heir at law would take the other half of the personalty and slaves in absolute property, and the residuary interest in the widow's half of the slaves. Here the heir, though not a "child," takes the precise interest which a child would take, had there been one; in either case the widow would be entitled to a life estate only in one half of the slaves, which on her death would revert to the heir, whether a child or not. The child and the heir are placed on the same footing, both in respect to the interest they are to take, and that to which the widow is entitled. "The child's part" is in all respects identical with the heir's part, and the widow's share is the same whether the heir be a child or a remote collateral.

Let reference be now made to the act of 1838, the following is the first section: "That in all cases in which the widow of a deceased person may be entitled to dower under the statute to which this is an amendment, she shall make her election either of dower or of a child's part, within 12 months after the probate of the will or granting letters of administration, or she shall be confined to her dower." We have seen that under the act to which this is an amendment, the widow's share would be the same whether the heir be a child or not. A child is certainly an heir, and if there be a child, there can be no other heir, and although an heir is not necessarily a child, I cannot perceive the force or conclusiveness of the argument which precludes the widow from making her election, in case the heir be a sister of the deceased, while it permits her to do so, in case her own and her husband's child be the heir. Before the widow can claim to take a child's part under the act of '38, she must show that she is entitled to dower under the act of '28, which she has relinquished. Then where the objection to placing her in the same attitude towards the heir under the last act which she held under the first, and which it is admitted she could assume under either towards her own and her husband's child. It was the design of the legislature in pass-

ing the act of 1838, to secure to the widow in certain cases a more ample and enlarged provision than was given by the dower act then in force.

I am of opinion that, that the words "child's part," in the first section of the act of 1838, may be fairly construed to mean a distributive share of the estate, whether the heirs and distributees be children or collaterals, and that the widow in this case could elect to take a distributive share or child's part of the estate. I cannot perceive that inconvenience or injustice can in any case arise out of this construction, on the contrary it appears to me to be the only construction which will give operation and effect to the act and secure to the widow the benefits intended to be conferred, in the particular instance in which they are most likely to accrue.

In viewing all the circumstances of this case, I am disposed to permit the widow to abandon her election of a child's part, and take her dower under the act of '28, should she wish to do so within six months from this date.

Opinion of Judge Randall.

Court of Appeals, January Term, 1840.

HARVEY ELLIS and wife,	Appellants.
vs.	
CHARLOTTE A. PARISH, widow of J. L. Parish, dec.	Appellee.

This cause is brought up by appeal from Jefferson superior court, upon an order of the confirmation of the report of the commissioners, appointed to allot to the widow of J. L. Parish, deceased, her share of her husband's real and personal estate, under the act, entitled "an act to amend an act concerning dower," approved February 8, 1838.

The widow having elected, under that act, to take a "child's part" in her deceased husband's estate, by her petition filed in the superior court on the 29th Novemher, 1838, an order issued in pursuance thereof to the sheriff to summon commissioners duly qualified to execute said writ, and to allot to the petitioner her portion of the decedant's estate. On the return of the said commission executed, a caveat or exceptions were filed at the April term, 1839, to said report, by Harvey Ellis for himself and wife, the sister and sole heir of the said defendant.

A pro forma judgment was by consent entered, the court below overruling the said caveat or exceptions, and confirming the commissioner's report for the purpose of bringing up the cause to this court by appeal.

The facts of the cause so far as they are material to the enquiry of this court are, that the commissioners assigned to the widow one moiety of the real estate in fee simple, and one moiety of the slaves

and personal estate absolutely and in gross, and the whole, both real and personal and slaves, free from debt.

It is also an admitted fact in the cause, that if the share thus allotted to be secured to the widow, it will not only deprive the sole heir, the sister, of any share or part of the estate, but also not have enough to pay and satisfy the debts of the testator.

The principal question to be determined by this court is, whether by the existing laws of this territory, the widow is entitled to claim in this case, and hold one half of all her husband's estate, real, personal and slaves in fee simple and absolutely, in preference to and free from the debts of the estate.

The affirmative of this question is attempted to be maintained by the counsel for the petitioner, on the terms and effects of the acts of the legislative council respecting dower, passed in 1828 and 1838. These acts are now to be examined for the purpose of deciding this question.

The first section of the act of 1828, secured to the widow "one third part of all the lands and tenements, &c. of which the husband died seized, &c. in and during the term of her natural life." This being precisely the common law provision respecting dower in lands, that section need not be further particularly noticed.

The second section of the same act contained the following provision, cited at large, as follows, viz:

"That when a husband shall die intestate or shall make his last will and testament, and not make provision therein for his wife as expressed in the first section of this act, she shall be entitled to a share in the personal estate in the following manner, to wit: if there be no children, or if there be but one child, in that case she shall be entitled to one half, but if there be more than one child, in that case she shall be entitled to one third part in fee simple except slaves, in which she shall have a life estate, and such claims shall have preference over all others."

This section is so clear and unambiguous as to admit of no doubt as to its meaning and effect, except in the last clause, and which, owing to an apparent contradiction to another provision in an act of the same session of the Legislature, was brought in question in the courts in the case of McCall vs. McCall, in Gadsden county. That question was however put to rest by the court of appeals, which ruled that it secured the provisions to the widow clear of all debts of the estate.

The act of 1838 is by its title amendatory of the above recited act of 1828. Being a short act it will be here quoted at length.

1st Section. That in all cases in which a widow a deceased person may be entitled to dower under the statute of which this is an amendment, she shall make her election either of dower or of a child's part, within 12 months after the probate of the will or granting letters of administration, or she shall be confined to her dower."

If this had been the whole of the act it would seem impossible to raise any question as to its import and effect. It offered the widow an "election" or alternative within a proscribed time either of "dower" or "of a child's part." The "dower" mentioned was clearly the provision made for the widow by the act of 1828. The terms and expressions in the recital make this so manifest that no language can make it stronger. The term dower as used in the act of 1828 was ruled also by the court of appeals to express and include not merely the common law, interest, and estate of the widow in the lands &c. of her husband's estate, but also the provision secured by that act, and other laws of the territory, in the personal estate of her husband and in his slaves.

The term "child's part," evidently meant the part or share of the estate to be apportioned amongst the children by the existing laws of the territory after the widow's dower and debts of the estate were satisfied.

This, from the nature of the provision, must be a varying share or proportion, to be determined by the number of the children in each case, with the addition of the widow. This addition will have to be made by necessary intendment, otherwise the result would be absurd, and might be destructive of the claim of a child. For instance, if one child only was left, and a widow, both would be regarded as children to take an equal part. If two children and a widow, a child's part would be a third, and so on, the widow in every instance to be regarded as a child, dividing equally with the children. This equality of right and interest in the widow and children seems to be the very object and end of the law.

Can it be contended that the law as thus far quoted secured to this new provision for the widow made at her election, a preference to or immunity from the debts of the estate? If it can be asserted, by what process of reasoning is the conclusion arrived at? The law in terms does not so express. By what legal intendment is the notion conveyed? Let it be observed that this is a provision designed for the widow, not for the children. A "child's part" is not designed to be changed, except so far as by election of the widow her dower secured by prior laws, is put in "hotch pot" with the child's or childrens' and the whole equally disturbed. It will not surely be advanced that the child or childrens' part or parts equally with the widow's is to be free or clear of debts or what has been adjudged to be equivalent, "to have a preference over all other claims." This would be utterly to defeat the claims of creditors. Would it be less monstrous or absurd to maintain that a "child's part" when secured to the widow means one thing, and when secured to a child another; that by name of "a child's part" a widow may obtain an ample adequate provision, and the other "child's part" be entirely absorbed and taken away by debts? This would be a strange measure of value or apportionment, a singular mode of comparison or equivalents. When the object refer-

red to as the measure of value may be nothing, a "cipher," and the subject of reference a large integer! a gross unchangeable amount. It is plain then that by the law as thus cited, "a child's part" remains as before; that share which one or more children took as his or their distributive share after debts paid and dower allotted. In other words, the widow was regarded as a child, and shared equally with the children after debts paid.

Let us now see whether in this respect the next section made any alteration, it is in the following words, viz: "That if a widow take dower she shall be only entitled to a life estate in the real property to return at her death to the estate of her deceased husband for distribution; if she takes a child's part she shall have in the property set apart for her, a fee simple estate in the real property, and an absolute title to the personal property including slaves, with power to control or dispose of the same by will, deed, or otherwise."

There is nothing discerned here to induce a different conclusion from that conveyed by the first section, as regards the immunity of the widow's part from the payment of debts.

If such had been the design, why was it not so expressed. It is still "a child's part;" she is to receive, as regards the share or appointment she is to receive, and to assimilate it still more to "a child's part," her quantum of estate or interest as regards duration, is extended to that before secured to children. The life interest in land is extended and enlarged into a fee simple in the one and an absolute estate in the other. This is the whole scope, and meaning, and end of the second section. And all the remarks upon the point of inquiry now under discussion remain not merely unimpaired, but re-inforced. For, surely, while the law so greatly enhances the estate and interest of the widow as regards its quality, it is not fair to assume that it would also so greatly enhance its quantity and value as in many instances to absorb the whole estate, to disinherit the children, and defeat creditors of their claims.

It is needless to enlarge upon this part of the case. It is manifest to that the law in question meant simply to give the widow an election to take an equal share with the child or children, that share to be subject to the same deduction for debts of the estate as other shares. This, the terms and obvious import, and this is in strict concordance with a regard to the claims of children and of creditors, while the opposite construction in this and in other cases, would be unequal, cruel, and unjust. Indeed, in so far forth as it would go to defeat creditors of their just claims to so ruinous an extent, no Legislature could ever have disigned it.

Concurring, as I do, in the judgment of the court, and in their construction of the liability of the widows share taken as a "child's part" to contribute with other shares of the children to the debts of the intestate, I go further, and consider the case at bar as not even governed by the act of 1838. I consider the act of 1838 as only applicable to a case when there is left by the intestate a "child"

or "children." In other words, I cannot construe a "child's part" to mean an heir's part in the contemplation of this statute. Certainly the terms are not synnonimous or convertable. A "child" is certainly an "heir," but an heir may not be a "child." Mrs. Ellis, then, heir at law of the intestate in the case before us, is not "a child;" she does not take as a "child," nor could she ever take a child's part. She is the sister, and heir at law, and takes as such, and so would father, mother, uncles, aunts, cousins, &c., not as children but as heirs. I ask, then, what warrant have we for construing the specific term "child or children" to mean the *generic* term "heir." The argument "*a minore a majus*" is always vicious in legal construction, "*omne majus in se contrazit minus*" is a law maxim, but not the converse. Here we make the less include the greater.

I ask, also, what warrant have we for concluding that the legislature ever meant that a "childs part" should mean an "heirs part," such is not their language. Not one word in this or in any other enactment indicates a purpose or design to make the shares of the widow and heirs general, commensurable, or correlative. In every instance the widows share, both at common law, by the statutes of every State in this Union, and by the laws of this territory, is made to bear a reciprocal relation to the number of children, but never (unless this act of 1838 afforded the instance) to the number of the collateral heirs. By the common law as modified by the statutes of wills and distributions, and by prior acts of this legislature, in case there was no child, the widow took one-half of the personalty, without regard to the number of collateral heirs. Now on the construction contended for, she is by operation of this law to divide equally with any indefinate number of collaterals, however remote in consanguinity, or even affinity. Where, I ask, is the reason for this change? Where the terms to justify it? Surely we ought not upon vague hypothesis, by remote intendment, to infer such change of purpose. With the children of the deceased husband, (most frequently too her own children,) there may be some reason, some policy in offering to her election an equality of interest and estate, with collaterals none whatever.

Moreover with regard to children and the consequent facility of making her election, their relation to their parents makes the ascertainment of their number a ready task, with collaterals, increasing in number as they are, remote from the intestate and seperated by distance as they increase, and obscure in their claims in the same proportion, the difficulty of making an election would in most cases render her election nugatory.

I cannnot, therefore, conceive why the legislature should ever have contemplated such an inovation. But if it were more apparent than I admit it to be, that the legislature ever meant to make this law applicable to a case like this, still I contend that their intention must be expressed by fit and appropriate language. It is no legitimate mode of construction to assume the legislature to mean what